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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NO. 81-2332

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY,
Petitioner,

v.

THE CHESAPEAKE AND POTOMAC
TELEPHONE COMPANY OF VIRGINIA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION OF THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, THE BOISE WATER CORPORATION AND THE IDAHO POWER COMPANY FOR LEAVE TO FILE A BRIEF IN SUPPORT OF RESPONDENT, THE CHESAPEAKE & POTOMAC TELEPHONE COMPANY OF VIRGINIA

DALE G. HIGER
MARK S. GESTON
SCOTT D. HESS
Eberle, Berlin, Kading, Turnbow
& Gillespie, Chartered
300 North Sixth Street
P.O. Box 1368
Boise, Idaho 83701
(208) 344-8535

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The Mountain States Telephone and Telegraph Company, the Boise Water Corporation and the Idaho Power Company, ("the Idaho Utilities"), by and through their undersigned attorneys, Eberle, Berlin, Kading, Turnbow & Gillespie, Chartered, respectfully move the Court, pursuant to Supreme Court Rule 42, for leave to file the attached Brief as an amicus curiae in support of the Respondent.

In 1971, the Boise Redevelopment Agency ("BRA"), pursuant to a plan of urban renewal adopted by the City of Boise, purchased numerous contiguous lots within the boundaries of the City's urban renewal district. The BRA next petitioned the County Highway District to vacate the streets and alleys abutting its purchases. It then required that all utility lines, poles, pipes and other facilities be removed from the newly vacated streets. The Idaho Utilities initially objected but, upon the condition that their claims under State and Federal statutes, for the costs of relocating their facilities be preserved, agreed to move those facilities so that Boise's entire urban renewal project would not be delayed.

Thereafter, the Idaho Utilities filed suit under both the Idaho Urban Renewal Law of 1965, *Idaho Code* §§50-2001 *et seq.* and the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 USC §4601 *et seq.* ("URA") seeking reimbursement for their relocation costs. The Idaho Supreme Court, in *Mountain States Telephone and Telegraph Company* v. *Boise Redevelopment Agency*, 101 Idaho 30, 607 P.2d 1084 (1980), held that the Idaho Urban Renewal Law allowed, but did not require reimbursement of the Utilities' relocation costs, founding its conclusion upon the common law rule that, in the absence of clear legislation to the contrary, utilities must remove their facilities from public ways at their own expense when so commanded by the sovereign. The Court then remanded the cause for further consideration of the Utilities' claims under the URA.

After a Summary Judgment in favor of the BRA, the matter was again appealed to the Idaho Supreme Court. As framed by the parties, the issue to be addressed by the Idaho Supreme Court in that appeal is whether a public utility is a "displaced person" under the URA and therefore entitled to reimbursement for their costs of removing and relocating their facilities from public rights-of-way as part of a Federally funded urban

renewal project. The issue before the Idaho Supreme Court is therefore identical to that before this Court in the instant proceeding. As a consequence, the Idaho Supreme Court has suspended further proceedings before it, pending the decision of this Court.

The Idaho Utilities recognize that their use of public rights-of-way is permissive under State law, but they do not believe this disqualifies them from being "displaced persons" under the URA. When Federal funds are sought for a State's urban renewal project, the State must first provide adequate assurances, under 42 U.S.C. §4630, to the Federal Government that it will make such relocation payments as the Federal Government would, had the Federal Government undertaken the project itself. Resort to the common law is neither necessary nor appropriate because the URA provides benefits in an area where traditional rules of law had not previously ventured.

Moreover, the Idaho Utilities claim they are "displaced persons", entitled to relocation benefits under the URA under the clear and unqualified language of that statute. The Idaho Utilities therefore have a direct interest in the resolution of the instant proceeding, identical to that of the Respondent. The City of Boise and the BRA have already been granted leave to assert their positions as amicus curiae in support of the Petitioner, and the Idaho Utilities are loathe to permit their arguments to go unanswered.

The Idaho Utilities have sought the consent of the parties to permit their appearance as amicus curiae. Such consent was denied by counsel for Petitioner, necessitating this Motion.

Wherefore, in light of their legitimate interest in the cause before this Court for consideration, the Idaho Utilities respectfully move for leave to file the attached Brief as amicus curiae.

RESPECTFULLY SUBMITTED this 29 day of April, 1983.

EBERLE, BERLIN, KADING,
TURNBOW & GILLESPIE,
CHARTERED

By s/
DALE G. HIGER
Attorneys for Utilities

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COME NOW the Mountain States Telephone and Telegraph Company, the Idaho Power Company and the Boise Water Corporation, ("the Idaho Utilities"), by and through their attorneys of record, Eberle, Berlin, Kading, Turnbow & Gillespie, Chartered, Boise, Idaho, and submit this Brief, as amicus curiae, in support of the position of the Chesapeake & Potomac Telephone Company of Virginia, Respondent in the case at bar.

I.

INTEREST OF AMICUS CURIAE

The Idaho Supreme Court has stayed all proceedings in *Mountain States Telephone and Telegraph Company, et al.* v. *Boise Redevelopment Agency*, Case No. 13977, pending the disposition of the instant case. The Idaho Utilities sought reimbursement in that litigation for the costs incurred when they were required to remove and relocate their distribution facilities from vacated public rights-of-way within Boise's urban renewal area.

The City of Boise's urban renewal project is a comprehensive redevelopment project for the core area of the city which is administered by the Boise Redevelopment Agency ("BRA") and largely funded by grants from the Department of Housing & Urban Development. After this Court granted certiorari in the case at bar, the Idaho Supreme Court stayed all proceedings to await the decision of this Court.

In *Norfolk Redevelopment & Housing Authority* v. *The Chesapeake & Potomac Telephone of Virginia*, 674 F.2d 298 (4th Cir., 1982), the Fourth Circuit held that the plain language of the Uniform Relocation Assistance and Real Property Requisition Policies Act, 42 U.S.C. §4601, *et seq.* ("URA"), required payments to utilities which are forced to move their facilities as a result of the acquisition of land by Federally funded projects. The Idaho Utilities believe the decision of the Fourth Circuit is correct. However, a controversy exists due to the conflicting interpretation of the URA reached by the Sixth Circuit in *Consumers Power Company* v. *Costle*, 615 F.2d 1147 (6th Cir., 1980). This Court's decision will resolve the conflict and most likely settle the dispute

before the Idaho Supreme Court. Therefore, the Idaho Utilities' last opportunity to present their position is before this Court, as amicus curiae.

Finally, the financial consequences of this Court's ultimate decision should be mentioned. The BRA received more than $6,000,000.00 in Federal funds to accomplish the Boise redevelopment project. It claims that if it is forced to pay the relocation costs sought by the Idaho Utilities, it will be financially unable to complete that project. Nevertheless, the Idaho Utilities assert that the cost of relocating their facilities should have been built into the BRA's original budgetary framework, or at least anticipated as a definite contingency when the Idaho litigation began in 1974. 42 U.S.C. §4631 specifically requires relocation benefits to be included in the planned cost of a project for which Federal monies are sought.

Given their interest in the action currently before this Court on certiorari, the Idaho Utilities hereby subn.it this Brief as amicus curiae in support of the position of the Respondent.

II.

STATEMENT OF THE CASE

The Idaho Utilities adopt the Statement of the Case as set forth in the Petition for Writ of Certiorari filed by the Norfolk Redevelopment & Housing Authority.

III.

SUMMARY OF ARGUMENT

The URA creates benefits, not new "estates" or "property", and functions simply where there is a cause and effect relationship between the acquisition of land and consequent removal of personal property. Nowhere in the text of the URA is there any distinction or qualification which would exclude public utilities from the generally-defined class of "businesses" entitled to relocation benefits. Commitment to the payment of relocation benefits by State agencies is a pre-

condition to the grant of Federal funds. The common law's prohibition against public utilities acquiring an estate in public streets permissibly occupied by them is therefore irrelevant to whether a person or a business is entitled to receive their benefits. The URA requires a State agency to act as the Federal Government would if it were carrying out the project in question, and the Federal Government has no inherent power to order utilities to remove their equipment, without compensation, from streets they occupy at the pleasure of the State Government.

IV.

ARGUMENT

THE FOURTH CIRCUIT PROPERLY APPLIED THE UNAMBIGUOUS LANGUAGE OF THE UNIFORM RELOCATION ACT, 32 U.S.C. §4601 ET SEQ.

In *Mountain States Telephone and Telegraph Company et al.* v. *Boise Redevelopment Agency*, 101 Idaho 30, 607 P.2d 1084 (1980), the Idaho Supreme Court determined that the BRA is, under *I.C.* §50-2006(a), "an independent public body corporate and politic . . .", upon which the State had conferred a measure of its police power. See also, *BRA* v. *Yick Kong Corporation*, 94 Idaho 876, 499 P.2d 575 (1972). The BRA is, therefore, a "State agency" within the meaning of the URA. 42 U.S.C. §4601(3).

The BRA acquired title to various contiguous parcels of real property in the city and then petitioned the County Highway District to vacate the abutting streets and alleys. Upon such vacation, the BRA acquired the land underlying the adjacent streets and alleys up to the centerline thereof. See *Mochel* v. *Cleveland*, 51 Idaho 468, 5 P.2d 549 (1930); *Shaw* v. *Johnson*, 17 Idaho 678, 107 Pac. 399 (1910); *I.C.* §50-311. The BRA thereupon ordered the Idaho Utilities to remove their equipment from the newly vacated streets.

The Idaho Utilities are all "public utilities" within the definition of *I.C.* §61-129. Mountain States Telephone & Telegraph Company had placed its lines on the public streets pursuant to *Idaho Code* §62-701 and Article XI, §13 of the Idaho Constitution. Idaho Power Company had used the pub-

lic streets for its electrical transmission facilities under the sanction of *I.C.* §62-705 and under franchise agreements with the City of Boise. The Boise Water Corporation had occupied the public streets by virture of *Idaho Code* §§30-802 and 40-305 and franchise agreements with the City of Boise.

In the case at bar, in virtually identical circumstances, the Fourth Circuit applied the unambiguous language of the URA and held that the Respondent utility was entitled to relocation benefits under 42 U.S.C. §4622.

To qualify for relocation benefits under the URA, a party must be a "displaced person", which is defined as "any person who . . . moves . . . as a result of the acquisition of . . . real property . . . or a program or project undertaken by a Federal agency, or with Federal financial assistance . . ." 42 U.S.C §4601(b). §4601(b) further defines a "displaced person" as a person required to vacate real property "on which such person conducts a business or farm operation." "Person" is defined as "any individual, partnership, corporation or association." 42 U.S.C. §4601(5). "Business", is defined in §4601(7) as "any lawful activity . . . conducted primarily (A) for the purchase, sale, lease, and rental of personal and real property and for the manufacture, processing, or marketing of products, commodities, or any other personal property; [or] (B) for the sale of services to the public." Nothing in the URA contains the slightest hint that this last definition contemplates any limitation on the size of a "business" entitled to relocation benefits, or as to the nature of its endeavor, apart from what is explicitly set forth in 42 U.S.C. §4601(7).

The Idaho Utilities are "businesses" which have been required to remove their personal property "as the result of" the acquisition of the real property by the BRA. As the Fourth Circuit noted below:

> ". . . It is this Court's duty to apply the literal reading of the statute. Doing so, we find that a utility comes within the Act's definition of 'business' and thus is a 'displaced person' under the Act." 674 F.2d at 301.

Indeed, the Petitioner herein concedes, in page 24 of its Brief, that the Respondent would be a "displaced person"

entitled to relocation benefits if, for example, "an office building it owned or leased . . . was being acquired under a Federal of Federally assisted project." It is difficult to reconcile Petitioner's extensive discussion of how the URA is a "people oriented" measure which implicitly excludes large, publicly regulated businesses such as Respondent and the Idaho Utilities, with this concession.

Under 42 U.S.C. §4622(a), relocation benefits must be paid for the removal of personal property. Petitioner argues that the utility transmission lines and other facilities are real rather than personal property. Under the regulations of the Department of Housing & Urban Development, 24 C.F.R. §42.40(m)(2), reference must be made to State law to determine the character of property. In Idaho, and generally, utility equipment is classified as personal property. 1 Thompson on Real Property §80; Pond, Public Utilities (3d Ed.) §472; *Mountain States Telephone and Telegraph Company* v. *Kelly*, 93 Idaho 226, 459 P.2d 349 (1969). *Newport Illuminating Company* v. *Tax Assessors*, 36 A. 426 (R.I., 1896); *Portland* v. *New England Telephone and Telegraph Company*, 68 A. 1040 (Me., 1907); *Rudolph* v. *Potomac Electric Power Company*, 24 F.2d 882 (D.C. Cir., 1928); *Connecticut Light and Power Company* v. *Town of Oxford*, 126 A. 1 (Conn., 1924). Moreover, under the principles announced by the Idaho Supreme Court in *Mountain States Telephone and Telegraph* v. *BRA, supra*, a utility which places its equipment on public rights-of-way necessarily does so with the knowledge that such occupation will always be at the pleasure of the State. Thus, the intent to permanently affix the equipment to the realty — the primary test to distinguish realty from personalty — cannot exist. *Bangor-Hydro Electric* v. *Johnson*, 226 A.2d 371, (Me., 1967); *Kane* v. *Timm*, 527 P.2d 480 (Wash., 1974); *Boise Payette Lumber Co.* v. *McCormick*, 32 Idaho 462, 186 P. 252 (1919); 2 Tiffany, *Real Property* (3d Ed.) §607; 34 Cal.Jur (3d Ed.) *Fixtures*, §5.

Second, the Redevelopment Agencies argue that the removal of the facilities was not occasioned by their acquisition of real property, but by the command of independent public bodies (such as the Ada County Highway District) having no direct interest in the redevelopment plan. A similar argument was made below and rejected by the Fourth Circuit:

> "While in a very technical sense, it may have been the city [the County Highway District] that closed the streets, the city was acting at the request of HUD and the [Redevelopment Agency]." 674 F.2d at 301.

See also, *Mountain States Telephone and Telegraph Company* v. *Boise Redevelopment Agency, supra,* at 607 P.2d 1088, 1089, fn. 3.

Moreover, the URA specifies only that the removal of personalty have occurred as a "result" of the acquisition of real property: it proposes a simple cause-and-effect relationship, and avoids formalisms which would prevent it from ameliorating the general burden of displacement inherent in large-scale urban renewal projects.

One need not delve into the URA's legislative history to find its purpose, because that is plainly stated at 42 U.S.C. §4621:

> "The purpose of this title [42 U.S.C. §§4621-4638] is to establish a *uniform policy* for the fair and equitable treatment of persons displaced as a result of Federal and federally oriented programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed to benefit the public as a whole." (Emphasis provided)

See also, *Alexander* v. *United States Department of Housing & Urban Redevelopment,* 441 U.S. 39, 99 S.Ct. 1572, 68 L.Ed.2d 28 (1979).

The essence of URA lies in its uniform application granting benefits to any "person" who is displaced by a Federally financed State acquisition of real property for urban renewal projects. The exclusion of utilities would run counter to this purpose.

Legislative histories are often helpful in interpreting acts of Congress. See eg. *NLRB* v. *Amax Coal Company,* 453 U.S. 322, 101 S.Ct. 2789, 69 L.Ed.2d 672 (1981); *Watt* v. *Alaska,* 451 U.S. 259, 101 S.Ct. 1673, 68 L.Ed.2d 80 (1981). However, such histories should be referred to only when, first, the disputed

statute is so ambiguous and lacking a plain meaning, that resort to them is necessary to resolve conflicting interpretations. Second, the legislative histories themselves must provide clear-cut guidance for the resolution of the ambiguity. The URA is an unambiguous piece of legislation whose clearly stated purpose fully comprehends payment of benefits to public utilities. See *Louisiana Department of Highways* v. *Coleman*, 444 F.Supp. 151 (D.La., 1978).

The quoted histories say nothing about *excluding* anyone at all from the URA's reach; if anything, the debates are framed, like the Act itself, in the most expansive and inclusive terms. Resort to the legislative histories is neither necessary nor requires any different construction.

The starting point for interpreting a statute is always the language of the statute itself, and, if clearly expressed, that language will ordinarily be conclusive. *Consumers Products Safety Commission* v. *GTE Sylvania*, 447 U.S. 102, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980), *U.S.* v. *Turkette*, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981); *Maine* v. *Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980).

THE LEGISLATIVE HISTORY OF THE URA NEED NOT BE REFERRED TO NOR DOES IT EXCLUDE UTILITIES FROM THE DEFINITION "DISPLACED PERSONS."

Petitioner and those amicus curiae aligned with it have placed untoward reliance on ambiguous legislative histories in attempting to find a Congressional intent to exclude public utilities from the URA's benefits. They cite House Report No. 91-1656, U.S. Code Cong. and Admin. News 1970, p. 5850, and other sweeping pronouncements from the Congressional floor, to characterize the URA as a "people-oriented" bill whose intent is to provide relocation benefits solely to families, individuals and "small" businesses. No such limitation appears anywhere in the URA, itself.

If Congress intended the URA to be limited to "people", then it would not have included partnerships, corporations and other associations in the definition of "persons". It is suggested that the URA's reference to "businesses" is somehow

intended to apply only to the small entrepreneur. But, the URA contains no limitation at all on the size of a business entitled to relocation benefits. In any event, such a vague and subjective limitation would be difficult if not impossible to administer.

THE COMMON LAW OF A STATE IS IRRELEVANT TO A PARTY'S ENTITLEMENT TO RELOCATION BENEFITS UNDER THE URA

At common law, public utilities do not acquire any estate or property right by virtue of their permissive use of public rights-of-way; rather, the utilities merely hold a license to use of a right-of-way, revocable by the State when public need so requires. *Mountain States Telephone and Telegraph Co.* v. *BRA, supra; State* v. *Idaho Power Company*, 81 Idaho 487, 346 P.2d 596 (1959). Because no "property" is "taken", public utilities are not entitled to just compensation pursuant to the Fifth Amendment of the Constitution or under State eminent domain statutes when they are required to move their equipment. But, these common law principles, on which Petitioner and the Sixth Circuit in *Consumer's Power Company* v. *Costele, supra*, rely, are irrelevant to any consideration of how benefits are dispensed under the URA. The Idaho Utilities believe that much of Petitioner's error can be attributed to careless usage of the term "right". As Petitioner uses it, the word "right" refers principally to property rights and estates. But as the term is used by Respondent and by the Idaho Utilities, it is applicable simply to the "right" or ability of a displaced person to claim a benefit; there is no necessity to first require the existence of a "property right" before a public utility, or any other "displaced person", has a "right" to a benefit created solely by the URA. The URA itself, specifically provides that it does not create any "rights or liabilities" with respect to the acquisition of real property under 42 U.S.C. §4651 or in any eminent domain proceeding. 42 U.S.C. §4602. But the URA does not place any similar qualification upon the relocation *benefits* which Federal and State agencies are required to dispense to persons displaced "as a result of" the acquisition of real property.

> "Because of the fundamental differences between 'damages' which he [displaced person]

> may recover under the eminent domain law and the 'benefits' to which he may be entitled under the relocation assistance law, and between the distinct judicial remedies involved, a displacee's claim for relocation benefits and eminent domain damages must be adjudicated in separate trials." *City of Mountainview* v. *Superior Court, County of Santa Clara*, 126 Cal.Rpt. 358, 361 (1975).

See also, 1 National Cooperative Highway Research Program, Selected Studies in Highway Law, pp. 72, 102.

The price actually paid to a voluntary seller of land or the compensation awarded a condemnee, is irrelevant; what is pivotal is the fact that a purely causal relationship links the acquisition of land, on the one hand, to the removal of personal property, on the other. Indeed, this Court has found "displaced persons" entitled to relocation benefits where there was no actual acquisition of land at all, just so long as those persons removed their property in good faith and upon the genuine belief that the property they occupied was about to be acquired for a Federally financed project. *Alexander* v. *Department of Housing & Urban Development, supra.* Nor does the URA require that "displaced person's" personal property have actually occupied the land acquired. 42 U.S.C. §4601(6). *Beaird-Poulan* v. *Department of Highways*, 441 F.Supp. 866 (W.D. La., 1977), aff'd 616 F.2d 255 (5th Cir., 1980); *Messer* v. *Virgin Islands Urban Renewal Board*, 623 F.2d 303 (3d Cir., 1980).

Petitioner and the amicus curiae aligned with it, would require that a claimant own a legal estate in the real property acquired by the Federally funded project before it is entitled to URA benefits. In support of this argument, the agencies cite *Consumers Power Company* v. *Costle*, 468 F.Supp. 375 (D. Mich., 1979), aff'd, 615 F.2d 1147 (6th Cir., 1980), two unreported District Court cases, *Public Service Company of Oklahoma* v. *Harris*, unreported No. 79-C-37BT (N.D., Okla., 1980) and *Lone Star Gas Company* v. *Landrieu*, unreported No. 80-100-C (E.D., Okla., 1981), and a Student Note, *Displaced Persons and the Uniform Relocation Act: A Proposed Methodolgy for Rewarding Benefits*, 58 Boston U.L.Rev. 596 (1978). None

of these authorities provide any authority for their pivotal finding that URA benefits depend upon the pre-existence and taking of an estate vested in a utility-claimant and cognizable under the Fifth Amendment. Moreover, 42 U.S.C. §4602(b) states that nothing in the URA shall confer any new right "in any condemnation proceeding brought under the power of eminent domain . . ." This provision is incompatible with the theory that the URA provides relocation benefits only where there has been a direct taking of a displaced person's legal estate.

BECAUSE THE URA DEFINES RELOCATION BENEFITS AND A PARTY'S ENTITLEMENT THERETO IN TERMS OF FEDERAL POWERS, REFERENCE NEED NOT BE MADE TO A STATE'S COMMON LAW

The URA provides a second ground to support the decision of the Fourth Circuit in the case at bar, and to demonstrate that the common law's prohibition against the acquisition of estates in public rights-of-way by utilities occupying the same under statutory grant cannot be relied upon to support the denial of relocation benefits claimed by Respondent.

42 U.S.C. §4630 requires a State agency contemplating a project requiring Federal funds to first give the Federal Government "satisfactory assurances" that fair and reasonable relocation assistance payments would be provided to or for displaced persons, *as are required to be provided by the Federal agency under §§202, 203* and *204* [42 U.S.C. §§4622-4624] . . ." (emphasis provided). This provision is the key to reconciling the URA and the common law rule obligating utilities to bear their own relocation expenses.

> ". . . [T]he legal duty created by §201 [42 U.S.C. §4630] falls on the 'head of a Federal agency,' rather than on State agencies directly. But it is equally clear, we think, that to receive Federal aid, state agencies . . . must give assurances that relocation assistance will be made available and, in accepting Federal aid, they incur an obligation to carry such assurances out."
>
> *Jones* v. *District of Columbia Redevelopment Land Agency,* 499 F.2d 502, 508 (D.C. Cir., 1974).

"Moreover, by accepting the responsibility of administering relocation benefits under the Federal statutes, the State has subjected itself to the same obligations as the Federal government and thus has consented to be sued [cite]."

Tullock v. *State Highway Commission of Missouri*, 507 F.2d 712, 715 (8th Cir., 1974).

"Full justice will be done by ordering the BRA to comply with the Federal law, if it becomes apparent that it has not done so."

Mountain States Telephone & Telegraph Company et al. v. *Boise Redevelopment Agency, supra*, at 607 P.2d 1091.

"If it were established prior to the Federal funds being paid to the [H]ighway Commission under the agreement, that the required assurances had not been secured, the remedy would be to prohibit the Federal defendants from releasing such funds to the Commission. In this case, as most of the funds have been paid over to the Commission under the right-of-way agreement, their remedy would only result in a small percentage of the funds being withheld. In such circumstances, where substantially all of the funds have been paid to the State agency involved and the project has been on-going under the agreement, a proper remedy is to direct the State agency using such funds to comply with the URA [cite]. In such circumstances it is too late for the State to withdraw from a project and return the Federal funds [cite]."

Whitman v. *State Highway Commission of Missouri*, at 400 F.Supp. 1068, fn. 35.

See also *Goolsby* v. *Blumenthal*, 581 F.2d 455, (5th Cir., 1978), reversed on other grounds, 590 F.2d 1369 (5th Cir., 1979).

The matter should be considered in the context of the dual sovereignty which lies at the heart of our Federal system.

The URA is not merely the urban renewal statutes or common law of a given State writ large, but is, instead, the pronouncement of a sovereign whose powers and abilities are very different from those of the State sovereign which originally conferred the privilege to use the public streets upon public utilities.

> "The laws of the United States are the laws of several States, and just as much binding on the citizens and courts thereof as the State laws are. The United States is not a foreign sovereignty as regards to the several States, but is a concurrent and, within its jurisdiction, paramount sovereignty. Every citizen of a State is a subject of two distinct sovereignties, having concurrent jurisdiction in the State; concurrent as to place and persons, though distinct as to subject matter."
>
> *Claflin* v. *Houseman*, 3 Otto 130, 23 L.Ed. 833, 838 (1876).

See also, the Tenth Amendment to the Constitution of the United States; James Madison, Federalist Paper No. 45; *Butte* v. *Illinois*, 33 U.S. 640, 68 S.Ct. 763, 92 L.Ed. 986 (1947); *Hoke* v. *U.S.*, 272 U.S. 308, 33 S.Ct. 281, 57 L.Ed. 523 (1912); *Railroad Company* v. *Fuller*, 84 U.S. 560, 21 L.Ed. 710 (1873); 16 Am.Jur.2d Constitutional Law §277 *et seq.*; 72 Am.Jur.2d, States, Territories and Dependencies, §16.

In the separation of powers and creation of the two sovereignties which accompanied the ratification of the Constitution, the several States retained full control over the public highways located within their respective borders.

> "The original source of power over both streets and highways is the State. But this power of control is generally delegated in some form to the municipalities and county authorities of the State."

Owensboro v. *Cumberland Telephone & Telegraph*, 230 U.S. 58, 33 S.Ct. 988, 57 L.Ed. 1389, 1394 (1913).

See also, 39 Am.Jur.2d Highways & Bridges, §§199, 200; *Teachers Insurance & Annuity Association of America* v. *City of Wichita*, 559 P.2d 347 (Kan., 1977); *Peden* v. *City of Seattle*, 510 P.2d 1169 (Wash., 1973); *Packard* v. *O'Neil*, 45 Idaho 427, 262 P.2d 881 (1927). Even the Federal Government's aid in the construction of a State's highways does not detract from the power of the State to control, regulate and maintain them. 39 Am.Jur.2d Highways, Streets & Bridges §201.

Because the State grants permission to use the highways to utilities, it may also withdraw it. *Artesian Water Company* v. *State Department of Highways & Transportation*, 330 A.2d 432 (Del., 1974); *Lehman* v. *Williamson*, 533 P.2d 63 (Colo., 1975); *Matter of Daben Corporation*, 469 F.Supp. 135 (Puerto Rico, 1979); *DeHaro* v. *U.S.*, 5 Wall, 599, 18 L.Ed 681 (1866); *Mountain States Telephone and Telegraph, et al.* v. *Boise Redevelopment Agency, supra; State* v. *Idaho Power Company, supra;* 1A Thompson on Real Property §§216, 224; 51 Am.Jur.2d Licenses & Permits §58. The State of Idaho having conferred the privilege, it lies with the State of Idaho and its subdivisions to withdraw it.

But the URA required the BRA and Petitioner to act as the Federal Government would as a pre-condition to receiving Federal assistance for urban renewal work, and the Federal Government would be powerless to confer or withdraw the privilege of gratuitous use of public streets. The question of the powers of "State agencies" under the common law is therefore secondary to the question of the Federal Government's powers, vis-a-vis the Idaho Utilities and Respondent.

This is consistent with the use of discretionary, rather than mandatory language in the Idaho Urban Renewal Law, and specifically I.C. §50-2007(h) and §50-2018(j)(3). *Mountain States Telephone and Telegraph Company* v. *Boise Redevelopment Agency, supra*, at 607 P.2d 1088, 1089. When read alongside the URA it becomes apparent that the Idaho Legislature anticipated that the Federal Government would require a

commitment to make relocation payments as a pre-condition to obtaining Federal project monies, but it did not wish to obligate local urban renewal agencies to make these payments in every other instance.

Petitioner supports its position by referring to the District of Columbia Public Utilities Reimbursement Act of 1972, P.L. No. 92-495, 86 Stat. 812 (1972). That law specifically permits the payment of relocation costs for public utilities. Petitioner's reasoning is that if the URA should be read as broadly as Respondent and the Idaho Utilities contend, there would have hardly been any necessity for Congress to restate the entitlement of public utilities to relocation costs in this other, specific statute. That argument is insupportable, first because the cited statute allows relocation costs for the relocation, replacement or removal of "all real and personal property," so relocated, "as the result of urban redevelopment . . ." District of Columbia Public Utilities Reimbursement Act, *supra*, §1(c), (d)(2). More importantly, the statute cited by Petitioner is, if anything, the exception which proves the validity of the Idaho Utilities' position. The Idaho Utilities contend that the Federal Government has no inherent power to require utilities to remove their facilities, and that when State agencies accept Federal monies under the URA, they are obligated to be similarly constrained. But in the District of Columbia, the Federal Government is, in fact, the sovereign; Congress occupies the same position with respect to the District of Columbia as do the State Legislaturers over the affairs of their respective States. *Palmore* v. *U.S.*, 411 U.S. 389, 935 S.Ct. 670, 36 L.Ed.2d 342 (1973); *District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100, 73 S.Ct. 1007, 97 L.Ed. 1480 (1953); *Traction Company* v. *Hof*, 174 U.S. 1, 19 S.Ct. 580, 43 L.Ed. 873 (1899). Thus, within the District of Columbia, the Federal Government was the sovereign who ultimately conveyed the privilege to public utilities to occupy streets, and, consequently, was the sovereign who could withdraw that privilege; when thusly viewed, the District of Columbia Public Utilities Reimbursement Act, *supra*, becomes fully consistent with the URA.

Absent specific Constitutional prohibition, the Federal Government may condition a grant of monies in any way it sees

fit; if a State which desires the grant cannot or refuses to comply with the conditions, then it is not entitled to receive it.

> "Also beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of Federal funds, Federal property and Federal privileges [cites]. The lesson of these cases is that the Federal Government may establish and impose reasonable conditions relevant to Federal interest in the project and to the over-all objectives thereof. Conversely, a State cannot compel use of Federal property on terms other than those prescribed or authorized by Congress [cite]. Article VI of the Constitution, of course, forbids State encroachment on the supremacy of Federal Legislative action."
>
> *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed. 1313, 1327 (1958).

See also, *King* v. *Smith*, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118, 1134, fn. 34 (1968); *Federal Power Commission* v. *Idaho Power Company*, 344 U.S. 17, 73 S.Ct. 85, 98 L.Ed. 15 (1952).

The BRA and Petitioner accepted their Federal grants with the explicit understanding that their respective programs would include the payment of such relocation benefits as the Federal Government would have been obligated to make if it had been the administering agency. What these two State agencies might have been able to do if their respective projects had been carried out exclusively within the framework of State common law and State finances is beside the point. See, for example, *Pacific Telephone and Telegraph Company* v. *Redevelopment Agency of the City of Glendale*, 151 Cal.Rptr. 68 (1978).

CONCLUSION

The Fourth Circuit, in the instant Appeal, was correct in reading the URA in a straightforward fashion. The unambiguous wording of the Act permits nothing else. To make the

distinctions drawn by the Sixth Circuit in *Consumers Power Company* v. *Costele, supra*, and by the Petitioner and the amicus curiae aligned with it herein, one must begin, as they have, by ignoring the text of the Act and going immediately to fragmentary exerpts from Congressional debates. There, they find exceptions to the Act founded purely on implication. Petitioner's references to the common law of the individual States, which are equally absent from the Act, are not even founded upon this equivocal ground.

By contrast, Respondent and the Idaho Utilities are able to carry out their argument completely within the confines of the URA; they find no necessity to go beyond its text. That text provides an internally consistent scheme for the payment of relocation benefits to all parties displaced by Federally funded projects, irrespective of whether such projects are actually administered by the Federal Government or by the various States.

The URA is a statute of the broadest application. The common law cannot operate to restrict that application because, first, the benefits conferred by that statute were created out of whole cloth by the Congress; they are independent of and distinct from the just compensation which the Fifth Amendment to the Constitution requires when "private property . . . [is] . . . taken for public use . . ." Secondly, when the Petitioner accepted its Federal grant, it agreed to act as the Federal Government would under the URA, insofar as the payment of relocation benefits is concerned; because the Federal Government was not the sovereign which conveyed the privilege to occupy public streets to Respondent and the Idaho Utilities, it could hardly withdraw that privilege, and Petitioner is now similarly constrained. For these reasons, the decision of the Fourth Circuit, below, should be affirmed.

RESPECTFULLY SUBMITTED this 29 day of April, 1983.

EBERLE, BERLIN, KADING,
TURNBOW & GILLESPIE,
CHARTERED

By s/
DALE G. HIGER
Attorneys for Utilities

CERTIFICATE OF MAILING

I hereby certify that on this 29 day of April, 1983, I caused to be mailed a true and correct copy of the above and foregoing MOTION OF THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, THE BOISE WATER CORPORATION AND THE IDAHO POWER COMPANY FOR LEAVE TO FILE A BRIEF IN SUPPORT OF RESPONDENT, THE CHESAPEAKE & POTOMAC TELEPHONE COMPANY OF VIRGINIA, and BRIEF OF THE AMICUS CURIAE, by regular, first class United States Mail, with postage prepaid, addressed as follows:

Francis N. Crenshaw
Crenshaw, Ware & Johnson
1640 Virginia National Bank Bldg.
One Commercial Plaza
Norfolk, Virginia 23510
Counsel for Petition, Norfolk Redevelopment

Jack E. Greer
Williams, Worrell, Kelly & Greer, P. C.
1700 Virginia National Bank Bldg.
P. O. Box 3416
Norfolk, Virginia 23514
Counsel for Respondent, Chesapeake & Potomac

Gary D. Babbitt
Hawley, Troxell, Ennis & Hawley
P. O. Box 1617
Boise, Idaho 83701
Counsel for Boise Redevelopment Agency

/s/
DALE G. HIGER